

Fifteen Decisive Battles
of the Law
by E. A. Jelf.

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FIFTEEN DECISIVE BATTLES OF THE LAW

*BEING A STUDY OF SOME LEADING CASES
IN THE LAW OF ENGLAND.*

BY

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PREFACE.

THESE papers appeared in the *Law Times* eighteen years ago, and by the kind permission of the Proprietor were then reprinted as a book. They are now once more reprinted by request.

The object I had in view was to present in a light form some of the most important decisions ever given by the Judges, in such a way that they might be easily remembered.

ERNEST A. JELF.

ROYAL COURTS OF JUSTICE,
1921.

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(a) *The Battle of Parkinson and Lee about the sale of hops: Vendor's victory.*—Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *Caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable upon examination, at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment on the matter; and if the result of the inspection be unsatisfactory, or if he distrust his own judgment, he may, if he choose, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable: (2 East, 314).

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DECISIVE BATTLES OF THE LAW.

INTRODUCTION.

"THERE are some battles," said Sir Edward Creasy, "which claim our attention . . . on account of their enduring importance, and by reason of the practical influence on our own social and political condition, which we can trace up to the results of those engagements. They have for us an abiding and actual interest, both while we investigate the chain of causes and effects, by which they have helped to make us what we are ; and also while we speculate on what we probably should have been, if any one of those battles had come to a different termination": (Preface to the First Edition of "The Fifteen Decisive Battles of the World from Marathon to Waterloo.")

There are some battles of the law which claim our attention for the same reasons ; battles of enduring importance ; battles whose practical influence is immense. Have not they also then for us "an

abiding and actual interest"? Is it not worth while here also to investigate the chain of causes and effects by which they have helped to bring the law into the condition in which we find it to-day? Must not we also speculate on how things might have been, if any of these law courts battles had come to a different termination?

We propose, then, to tell the history of fifteen decisive battles of the law.

"The reasons," said Creasy, "why each of the following fifteen battles have been selected will, I trust, appear when it is described. But it may be well to premise a few remarks on the negative tests which have led me to reject others, which at first sight may appear equal in magnitude and importance to the chosen fifteen": (*Ib.*) He then proceeds to explain that the number of killed and wounded in a battle do not determine its historical importance; and also observes that there are many battles of great consequence, and attended with circumstances which powerfully excite our feelings and rivet our attention, and yet which appear to him of mere secondary rank, inasmuch as either their effects were limited in area or they themselves merely confirmed some great tendency or bias which an earlier battle had originated.

The reasons why each of our following battles

has been selected ought to be no less apparent from its description.

The negative tests are in our case also worthy of remark. If the numbers of killed and wounded do not determine the historical importance of a battle, neither is the historical result of a case at law to be gauged by the amount of damages awarded or the gravity of the sentence passed. If that were so, some case of contract—ordinary to the lawyer, but where the damages happened to be phenomenal—would be for this reason the “greatest” battle; or *R. v. Titus Oates* or *R. v. Dangerfield* would deserve that honour on account of the inhuman whippings inflicted on the prisoners.

There are other battles “of great consequence” in one sense which we, like Creasy, must deprive of a place in our fifteen on the ground that “their effects were limited in area.” Such are the cases which only affect a particular trader or class, or which turn on the meaning of some local or personal Act of Parliament.

Others, again, we must also except because “they themselves merely confirmed some great tendency or bias which an earlier battle had originated.” In other words, we shall be dealing only with leading cases strictly so called—cases which for the first time distinctly stated a principle.

Yet once more to quote Creasy. "I am aware," he wrote, "that a little activity of imagination, a slight exercise of metaphysical ingenuity, may amuse us by showing how the chain of circumstances is so linked together, that the smallest skirmish, or the smallest occurrence of any kind that ever occurred, may be said to have been essential in its actual termination to the whole order of subsequent events. But when I speak of causes and effects, I speak of the obvious and important agency of one fact upon another, and not of remote and fancifully infinitesimal influences. . . . When I speak of cause and effect, I speak of those general laws only by which we perceive the sequence of human affairs to be usually regulated, and in which we recognise emphatically the wisdom and power of the Supreme Lawgiver, the design of the Designer" : (*Ib.*)

Sir Edward Creasy was a lawyer. He was the Chief Justice of Ceylon. And he would doubtless have appreciated how true these observations are when applied, according to our analogy, to the battles of the law. For "slight skirmishes" in the law courts between learned counsel and great judges have been solemnly reported; and the *obiter dicta* found in the books—the mere incidents of these skirmishes—have had results at which those judges

themselves would have often been surprised. The "smallest occurrence," such as the pleader's slip or the notice that was out of time, has had the most far-reaching consequences. But when we speak of causes and effects, we shall "speak of the obvious and important agency of one fact upon another, and not of remote and fancifully infinitesimal influences."

In other words, all the above-named principles of selection will be followed to the best of our ability in the Fifteen Decisive Battles of the Law.

The first battle will be the Battle of Ashby and White.

I.

THE BATTLE OF ASHBY AND WHITE.

Two hundred years ago an assembly of six-and-sixty noble lords were met together to hear arguments and give judgment in the House of Lords. The immediate subject of their meeting was an appeal in an action between Matthew Ashby and William White; but on the result of their deliberations depended not merely the satisfaction of one of two litigating parties, but the whole future progress of English law.

Queen Anne was upon the throne, and the Lord Keeper of the Great Seal was Sir Nathan Wright.

The position at the moment when our narrative begins is summed up in a sentence by Hallam in his Constitutional History. "One Ashby, a burgess of Aylesbury, having sued the returning officer for refusing his vote, and three judges of the Queen's Bench, against the opinion of Chief Justice Holt,

having determined for different reasons that it did not lie, a writ of error was brought in the House of Lords": (vol. 2, chap. xvi.).

These are the facts in a nutshell. To copy the declaration would be to occupy some pages, and to tell our readers little or nothing more.

White was one of the four constables of the borough of Aylesbury, and his fellows—Talbois, Bell, and Heydon—were joined with him as defendants. They were hopeful for victory, for their counsel—Whitaker, Weld, and Montague—had secured a majority of the Court of Queen's Bench which had sat below.

The Lords had summoned the judges to assist them with their advice. These were Trevor (the Chief Justice of the Common Pleas), Ward (the Chief Baron of the Exchequer), and Barons Price, Bury, and Smith. It was a great court, and it was a great question which hung upon their decision.

Ashby had satisfied the jury that the defendants had refused him the vote to which he was lawfully entitled, and they had given him a verdict for damages accordingly. The only question was one of law. Why should not Ashby, having been wronged, be compensated by damages for the injury which had been done to him?

Why not? Let us give the answer in the words of Mr. Justice Gould, one of the judges of the Queen's Bench, who had given judgment for the plaintiff in the court below.

"I am of opinion," said he, "that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff; for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges; secondly, because it is a parliamentary matter with which we have nothing to do; thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuria*; fourthly, it relates to the public, and is a popular offence."

Mr. Justice Powys said (among other things): "This action is not maintainable for another reason, which, I think, is a weighty one, viz.: this action is *primæ impressionis*. Never the like action was brought before."

The judgment of Sir John Holt, Chief Justice, was a long one. "I will maintain," said he, "firstly, that the plaintiff has a right and privilege to give his vote; secondly, in consequence thereof that if

he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber. . . . A damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right."

As for the rest of the judgment and that of the rest of the court, are they not written in Smith's Leading Cases?

Now then, let us see what was the precise issue before the House of Lords. It was nothing less than this. Where there is a right, is there a remedy? or is an action to fail because it is, in the words of Mr. Justice Powys, "*primæ impressionis*"?

Primæ impressionis! Never the like heard before! Was then rigid precedent forsooth to be the foundation of the English common law and the most ordinary principles of justice to be perverted?

Primæ impressionis! Just think of it. If such a view had been solemnly supported by the House of Lords, this would have been a binding precedent on every court of law, and it would have tied up the whole law of England into a bundle of tape.

On the contrary, it was not to be—an embryo was struggling to the birth, whose name was "Action on the Case"—and the infant which was

to be born was to grow to be one of the mightiest protectors of the law.

Law lives by its sanction. Then there must be a sanction for every law. If there be none in the books, the common law will not for that reason stand idly by. No, the common law of its own motion will create the sanction.

The judges summoned to advise the lords gave differing advice. Chief Baron Ward and Barons Bury and Smith agreed with Sir John Holt. Chief Justice Trevor and Baron Smith supported the view of the majority of the court below.

The Lord Keeper of the Great Seal has no voice in the matter, not being a peer; he can only put the question.

Lord Summers or Somers, the ex-Chancellor, argues for the view of Sir John Holt, and he prevails.

“After hearing counsel at the Bar to argue the errors assigned, &c. . . . after due consideration of what was offered thereupon, it is this day ordered and adjudged that the said judgment given in the Court of Queen’s Bench . . . shall be and is hereby reversed. And it is further ordered that the plaintiff Matthew Ashby do recover his damages by the jury assessed in the Queen’s Bench, and also do recover the further sum of ten pounds for his

costs in this behalf sustained, by this court to him adjudged." (Lords Journals, 14th Jan. 1703.)

Whitaker, Weld, and Montague, you must confess yourselves beaten. White, Talbois, Bell, and Heydon, you must pay the damages which the jury have assessed against you, and £10—a considerable matter in those days—for costs beside.

The House of Commons may "be thrown into a transport of fury" (see Campbell's *Lives of the Chief Justices*, vol. 2, chap. xxiv., p. 160), but it will be all of no avail.

Their resolution is, "That the qualification of an elector is not cognisable elsewhere than before the Commons of England in Parliament assembled; that Ashby having commenced an action against the bailiffs of Aylesbury for rejecting his vote, is guilty of a breach of the privileges of this House; and that whosoever shall in future commence such an action, and all attorneys or councillors soliciting or pleading the same are guilty of a breach of the privileges of this House, for which they may expect condign punishment."

Parliament was shortly afterwards prorogued. During the recess other electors of Aylesbury, whose votes had been rejected like that of Ashby, brought fresh actions against the returning officer. As soon as Parliament met these plaintiffs were all

committed to Newgate for breach of the privileges of the House of Commons. The captives sued out writs of *habeas corpus* to the Queen's Bench, and the quarrel between the Lords and Commons lasted until the dissolution. The story of that quarrel, and of the events to which it gave rise, is too long to be told here ; suffice it to say that the judgment of the House of Lords upon the question which was the subject of the Battle of Ashby and White has never been, and never will be, reversed.

"*Ubi jus ibi remedium*" may be accepted thenceforward as one of the first principles of the English law.

II.

THE BATTLE OF MITCHELL AND REYNOLDS.

FEW doctrines of law have been the subject of more memorable fights, both in the past and present, than the doctrine of the avoidance of contracts for restraint of trade.

But by far the greatest battle ever waged upon the subject was the Battle of Mitchell and Reynolds, fought in the Court of Queen's Bench in the year 1711, some eight years later than the Battle of Ashby and White, described in our last chapter.

Queen Anne was still upon the throne; and Parker (afterwards Lord Chancellor Macclesfield) was Chief Justice at this time—a man of plebeian origin, but of singular learning in the law.

Never had he a better opportunity of exhibiting his learning and his commercial sound sense than when Mitchell, the baker, came before him to enforce a bond for £50. By that bond Reynolds had bound himself under the above-mentioned

penalty not to exercise the trade of a baker within the parish of St. Andrew's, Holborn, for the space of five years.

It appeared that Reynolds had assigned to Mitchell a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's, Holborn, for the term of five years. The bond was therefore given to prevent Reynolds from setting up a baker's shop within that period to compete with the baker's shop which he had himself just sold to Mitchell.

The defendant pleaded, "That he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*."

In other words, he said that the bond was void because it operated in restraint of trade.

We are told that "This matter had been several times argued at the Bar"; and at last the time was come when the two bakers were listening for the judgment of the court.

Reynolds was in high hopes that the bond he had given was worth only so much waste paper. He intended to "sell his cake and eat it." If the law wished to prohibit restraint of trade, here was a chance for it to do so.

Mitchell was determined to have his bond,

which appeared to him to have been an eminently reasonable one.

Was it? That was the real question. For the law is not unreasonable in its discouragement of restraint of trade.

The Chief Justice propounded several propositions in the course of his judgment.

"To obtain," said he, "the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law. When restrained to particular places or persons, if lawfully and fairly obtained the same is not a monopoly. Since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely and in itself unlawful. It is lawful upon good consideration for a man to part with his trade. Since actions upon the case are actions *injuriarum*, it has been always held that such actions will lie for a man's using a trade contrary to custom or his own agreement; for there he uses it injuriously. Where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty. No man can contract not to use his trade at all. A particular restraint is not good without just reason and consideration."

Presently he came to the more particular circumstances of the case before him. "Here," said he,

“the application of this to the case at Bar is very plain. Here the particular circumstances and consideration are set forth, upon which the court is to judge *whether it be a reasonable and useful contract*. The plaintiff took a baker’s house, and the question is whether he or the defendant shall have the trade in this neighbourhood. The concern of the public is equal on both sides. What makes this the more reasonable is that the restraint is exactly proportioned to the consideration, viz., the term of five years. To conclude—in all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth, that presumption is excluded. And the court is to judge of those circumstances and determine accordingly. If upon them it appears to be a just and honest contract, it ought to be maintained. For these reasons we are of opinion that the plaintiff ought to have judgment.”

The importance of the issue of this battle to Trade at large is obvious. A decision in favour of Reynolds would have caused the greatest inconvenience commercially and economically. But to the lawyer the *argumentum ab inconvenienti* is not always convincing. Hard cases make bad law. Parker hit the right nail on the head in asking what was “reasonable.” This word, now heard so

often in the courts, was not so common in those days. Parker here uses it in exactly its best connotation. Parker, as the practical man, was the best lawyer for a case of this commercial importance; and the whole of this judgment is the prototype of a whole series of latter-day judgments of which "the reasonable thing" forms the keynote, and of which the late Lord Esher was perhaps the foremost exponent.

The doctrine of restraint of trade would have ended in disaster if the battle had gone the other way. It was essential to the value of that doctrine that it should be always interpreted in the light of "what is the reasonable thing?"

At the same time Parker saved the doctrine itself in its general form—and a most valuable doctrine it is. The policy of the law requires that there shall be no general restraint of trade.

The general policy of the law is always, of course, to encourage both Trade and Freedom; and it has been so ever since Magna Carta laid it down that "*Nullus liber homo disseisetur de libero tenemento vel libertatibus vel liberis consuetudinibus suis.*" The question is always how so to draw the line that neither individual freedom nor general trade shall in the long run suffer.

Various engagements have been fought as to

where this line shall be drawn, and a certain number of general rules have been drawn up in consequence: (see *Collins v. Locke*, 41 L. T. Rep. 292, in the House of Lords; also *Harms v. Parsons*, 7 L. T. Rep. 815; *Vernon v. Hallam*, 55 L. T. Rep. 676; *Jacoby v. Whitmore*, 49 L. T. Rep. 335; and *Urmston v. Whiteley*, 55 J. P. 453). But in principle the matter was determined once and for all (so far as the common law is concerned) in the decisive Battle of Mitchell and Reynolds.

III.

THE BATTLE OF KEECH AND SANDFORD.

THIS battle was fought in 1726—fifteen years later than the Battle of Mitchell and Reynolds.

By this time it was already considered that a man was repeating a truism of ancient history if he said that Queen Anne was dead. Indeed, the reign of King George I. was drawing to its close.

This battle was fought upon an altogether different battlefield from those which we have hitherto described, for it was fought in the High Court of Chancery. Lord King, who at this time held the Great Seal as Lord Chancellor, was fifty-seven years of age. He had spoken long ago in the House of Commons upon the question of privilege which arose upon the Battle of Ashby and White, as described in an earlier chapter. On that occasion he had defended the victory of Ashby in a House where that victory was unpopular, and now it was his own turn to preside at a contest which

was hardly less important in its way even than that famous *Aylesbury* case itself. The battle of *Keech and Sandford* is known as "the *Rumford Market* case."

The facts are told us so shortly that we may, without fear of prolixity, copy the statement.

"A person being possessed of a lease of the profits of a market, devised his estate to a trustee in trust for the infant. Before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant: which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do. There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself."

This state of facts presented a difficult problem. The principle that a man must not in general make a profit for himself out of his trust is a simple one; and was not in truth contested. It was said, however, that the express proof of the refusal by the lessor to renew the lease to the infant distinguished this case and put it outside the principle.

Would the court yield to this argument? It is scarcely too much to say that the whole future of

equity hung upon the answer which should be given to this question.

A bill had been brought by the infant to have the lease assigned to him and for an account of the profits. Was the infant to have the advantage of the fact that, whereas the trustee had done what he could as trustee to obtain a renewal for his *cestui que trust*, yet, failing that, had taken a lease for himself? That lease, if granted to any other person in the world but Sandford, would have been unimpeachable. How stood it with Sandford?

Lord Chancellor King gave judgment in these words: "I must consider this as a trust for the infant. For I very well see, if a trustee on the refusal to renew might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is a fraud in this case, yet he (the trustee) should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease. But it is very proper that the rule should be strictly pursued and not in the least relaxed. For it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestuis que usent*."

He therefore decreed that the lease should be

assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and that there must be an account of the profits made since the renewal.

Sandford may be imagined looking at Rumford Market as Romeo looked at Verona when he said :—

“ . . . Heaven is here
Where Juliet lives : and every cat and dog
And little mouse, every unworthy thing
Live here in heaven, and may look on her :
But Romeo may not ! ”

As the infant's trustee he was not only unable to make a profit out of his trust in return for his trouble, but was even in a worse position than any other person in the world in respect of this lease.

The Battle of Keech and Sandford established a great principle, which courts of equity have ever since upheld. Wherever a person clothed with a fiduciary or *quasi*-fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by courts of equity, such person becomes a constructive trustee, and the advantage gained must be held by him for the benefit of his *cestui que trust*.

The rule has certainly not been weakened by authority from that day to this. If anything, it has been extended: (see *Mulvany v. Dillon*, 1 Ball & B. 409; *Eyre v. Dolphin*, 2 Ball & B. 298; *James v. Dean*, 15 Ves. 236; and *Bradford v. Brownjohn*, 19 L. T. Rep. 248).

A curious recent case is *Silkstone and Haigh Moor Coal Company v. Edey* (1900) 1 Ch. 167, but that was a case of fraud.

We could not hesitate in including the Battle of Keech and Sandford as one of the decisive battles of the law. Decided the other way, it would have greatly eased the position of some innocent trustees; but, for once that it had had that effect, it would have opened the door a hundred times to fraud. Sandford was not fraudulent; but equity had to think not only of actual fraud, but of the possibility, or rather probability, of fraud.

IV.

THE BATTLE OF WARD AND TURNER.

TWENTY-SIX years later than the Battle of Keech and Sandford the battle was fought which gives its name to our present chapter.

King George II. was now upon the throne; and the great Lord Hardwicke was Lord Chancellor. The High Court of Chancery was once more the battlefield.

The object of the proceedings was to have a transfer of £600 New South Sea Annuities made to the plaintiff Ward as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly, who had died intestate, delivered or made over to the plaintiff.

Mosely had married Fly's aunt. Fly had great obligations to Mosely, who took care of him in his infancy. Fly used to come to Mosely's house from school when it broke up. Afterwards Mosely, who in the latter part of his life appeared to be in very mean circumstances, lived with Fly as his servant

ward, Executor of John Mosely
Turner, Admin^r of Wm Fly

until Fly's death, had his victuals there, performed services to him, and had now and then a shilling given him. Fly made profession of a strong intent to do for him at his death, and had great kindness for him. As Fly drew near his end, being in a very bad state of health, he made Mosely several presents in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts and declarations supporting them. The first was on the 18th Jan., 1746—spoken to by the porter of Furnival's Inn. The second was on the 6th Feb. of the same year, and was the principal proof relied on by the plaintiff to support the gift of these annuities. It was proved by Fly's barber. Fly sent for the barber. The barber found Fly and Mosely alone together. Fly said: "I intend to give him"—indicating Mosely—"the Longford Estate for life. But I have considered of it. That which is worth £40 a year to another is not worth so much to him. For if the tenants wanted an abatement for repairs, he would allow it. Therefore I will do better for him." Then, as the barber notified, Fly went to his escritoire, and, taking three papers, said: "I give you, Mosely, these papers, which are receipts for South Sea Annuities, and will serve you after I am dead." The third was on the 23rd Feb. of the

same year. A witness swore that in his presence Fly said: "Mosely, I give you all the plate and goods in this house." The fourth was on the 3rd March of the same year. The same barber swore that on that date Fly declared to him and to another person, who alone were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books. This with the three receipts he said would make £2,000. He wished a gentleman of his acquaintance to have his sword and gun, but all the rest he gave to Mosely.

Fly died in the following April.

What was the effect of the gifts made by Fly to Mosely? Did they operate to pass the property?

Mosely also was now dead; but his representative joined battle with the representative of Fly upon these issues.

History does not relate what were the names of the counsel employed by the parties. But we know the plaintiff's counsel argued that he had proved so many declarations of bounty supported by so many witnesses at different times. The defendant's counsel admitted that there was no evidence actually to impeach the evidence of the gift, but

said that there was evidence to invalidate it to a certain degree, principally from the behaviour of Mosely after the death of Fly, as not like one who thought he had a right to these donations from him. For it was sworn that, being at the house of Fly at his death, he continued there until midsummer. He did not say these goods were his own upon application made to buy them, but that they were Turner's. Turner was the administrator and next of kin. He sent to Turner, desiring him to take them away, and they were sent away. Mosely assisted in packing them up, and said: "I will not go into mourning. For Fly has given me nothing that he could help."

Lord Hardwicke now gave judgment. "Suppose," said he, "the facts above sworn to—i.e., by the witnesses for the plaintiff—were proven, what is the law arising on these facts? First, as to any part of the things given except the £600 South Sea Annuities, I am of opinion that the gift is not good, there being no pretence of any delivery, and it is too general. If they prove anything, they must prove a nuncupative will. Then, for argument's sake, take the gift of the £600 South Sea Annuities as an independent donation. The question is whether it be such a gift as the law of England will allow as a *donatio mortis causa*. And, first, the

fact of the gift is proved only by one witness, whereas the civil law requires five witnesses and limits it in point of value. The express gift is of the three receipts only, which the plaintiff would construe as a gift of the South Sea Annuities. The question that arises is whether the delivery of the thing given by way of *donatio mortis causa* is necessary. And, if necessary, is this delivery of the three receipts a sufficient delivery? I am of opinion a delivery is necessary, and that the delivery of the three receipts is not sufficient to validate this act. In the Roman law there are three kinds of *donatio mortis causa*: (1) Where the property in the thing doth not vest until the death of the donor; (2) where the property immediately passes, but is defeasible, in case the donor recovers; (3) where the donor, moved with present danger, doth not think it so immediate as to give the party a vested interest in them, but only to take effect when the donor dies. Now, as to the second the civil law requires a delivery; but as to the first and third not an absolute delivery, because the property doth not completely pass till the death of the donor. But the civil law is not binding in this country, further than it hath been received and allowed here, and that must be determined by the authorities. And the result of the authorities is that the civil

law hath been received in England only so far as the gift hath been attended with delivery. Then I come to the question whether the delivery of the three receipts is a delivery of the thing. I am of opinion it is not, and find no authority for it. The delivery of the thing given is what is relied on in all the cases. The only case where a symbol was held good was a case of the key of the trunk wherein the thing was kept (*Exchequer Tallies*); but I am of opinion that that amounted to a possession in the donee of the tallies. For the donor was restrained from making use of them without the consent of the donee, and the donor could not rightfully come at them without the key. I think in like manner as to a key of a warehouse for goods or of a wine cellar. But as to the delivery of the receipts for the stock it amounts to nothing—they being of no use after the acceptance of the stock, and are seldom kept. Suppose a mortgage and a separate receipt taken for the consideration money, and the receipt is delivered over, it could not be a delivery of possession. Upon the whole, I am of opinion this gift is not valid without a transfer, or something that amounts to a transfer, and, it being unaccompanied with a delivery, is merely legatory, and amounts to a nuncupative will, and allowing it would be a breach

of the Statute of Frauds. Therefore let the bill be dismissed as to the gifts claimed."

Many a death-bed scene has been enacted from that day to this in which property has been purported to have been given with or without delivery, with or without "something amounting to a transfer," with or without a condition that the gift is to be inoperative if the donor recovers, &c. The legal results of all such gifts must be tested by what Lord Hardwicke said on this occasion.

Hence the great importance of the decisive Battle of Ward and Turner, which was fought in 1752.

V.

THE BATTLE OF DOVASTON AND PAYNE.

THE Battle of Dovaston and Payne was fought upon a special demurrer to a plea in bar of an avowry for taking cattle damage feasant, that the cattle being on the highway, had escaped into the land of the defendant through a defect of fences.

King George III. was upon the throne, and the fight took place before his Court of Common Pleas, consisting of the Lord Chief Justice Eyre and Justices Buller, Heath, and Rooke. The date was 1795, being forty three years later than the Battle of Ward and Turner.

The immediate point in the Battle of Dovaston and Payne was a mere point of pleading. Was "being in the highway" a sufficient allegation; or should it have been shown that the cattle "were passing through and along the said highway"?

But something much more than a technicality was involved. Mr. Serjeant Williams, in his argument on behalf of the plaintiff, alleged "that the

owner of the soil may have trespass if the cattle do anything but merely pass and repass." Mr. Serjeant Heywood, on behalf of the defendant, asserted that "if the defendant were bound to repair the fences, it was immaterial whether the cattle were passing on the highway or not."

Which was right? There was much involved in the answer to this question. What is the "King's highway," about which people talk so glibly? What is it in law? Is it a sort of no man's land, where everybody may do as he or she pleases? Is it a place where owners of property may be laughed at and defied? Does the "man in the street" stand in the same relation to the street as does the squire to his park? Or is the right of the public to be limited and defined, and, if so, how?

Such were the questions at stake. It is obvious at a glance that their importance was enormous.

The judgment of the Lord Chief Justice Eyre seems to us a miserable halting between two opinions, to which it is hardly worth while to refer in any detail.

Mr. Justice Buller's judgment is entirely confined to the pleading aspect of the case. The following sentence is a fair specimen of it: "Certainty in pleading," said he, "has been stated by Lord Coke to be of three sorts—viz., certainty to a common

intent, to a certain intent in general, and to a certain intent in every particular."

The case would have been of little or no interest to the present generation had it not been for the judgment of Mr. Justice Heath. This was short and to the point. He said: "The law is that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way. For the property is in the owner of the soil, subject to an easement for the benefit of the public. On this plea it does not appear whether the cattle were passing and repassing, or whether they were trespassing on the highway. The words used are entirely equivocal."

The decision of the court was unanimous in favour of the plaintiff.

Many an owner of property has had reason to be grateful for the decision of the court. A highway was thenceforward known to be a place where all the King's subjects had only the right to pass and repass.

Mr. Justice Heath's propositions have ever since
B.L. 3

passed as law. Thus in *Vestry of St. Mary, Newington v. Jacobs* (28 L. T. Rep. 800) the defendant was found to be the owner of the soil of the highway, and the Court of Queen's Bench said: "the owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith, and the appropriation made to and adopted by the public does not deprive him of any right as owner of the land not inconsistent with the right of passage by the public." So in *Reg. v. Pratt* (4 E. & B. 865) the appellant was found guilty of trespass in pursuit of game, though he was in fact on the highway. In *Harrison v. Duke of Rutland and others* (68 L. T. Rep. 35) the defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the mere purpose of passing and repassing, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting by preventing the game from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly prevented the plaintiff from such interference, he brought an action for assault

against the defendant. "In this case," said Lord Esher, "it appears to me clear that the plaintiff was a trespasser."

Lord Justice Kay, quoting the definitions of the public right in the highway as "a right of passage" and "a right of passing and repassing," continued thus :

"Probably this is sufficiently accurate and precise to enable anyone to determine what in each particular instance is an improper use of the soil. Many of such instances may be too trivial to justify an action or prosecution. That is so in every case of trespass. If a man walks into the field of another without permission, he is a trespasser. But an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser, but no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other ; and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse."

In each of these cases the land-owners were merely holding the ground won for them by Dovaston

in the great and noteworthy Battle of Dovaston and Payne, fought in the old Court of Common Pleas in the reign of King George III.

VI.

THE BATTLE OF WILLIAMS AND THE EAST INDIA COMPANY.

It was only seven years later than the Battle of Dovaston and Payne; King George III. still occupied the throne; and Lord Ellenborough was Chief Justice, when the important Battle of Williams and the East India Company was fought.

Lord Ellenborough was the son of Dr. Edmund Law, the Bishop of Carlisle. He was a man of great personal dignity, and a strong judge in every sense of the word.

The Battle of Williams and the East India Company began at the Guildhall before Lord Ellenborough and a jury in 1802. Williams was a shipowner; and the defendants were the great and powerful company who were the pioneers of the British Empire in India.

Williams declared that he was the owner of a ship called the *Princess Amelia*. One J. Ramsden was her master, and on the 14th Feb., 1797, she

was at anchor in the river Thames. On that day a charter-party was made between himself and Ramsden of the one part and the company of the other part, by which the *Princess Amelia* was let to freight to the company. In this charter-party there was a covenant for the owner to receive and take on board the ship, and well and securely stow and place therein, all such goods as should be laden or tendered to be laden on board by the order of the company or their servants. On the 20th July, 1797, the *Princess Amelia* sailed under this charter-party to the East Indies on her voyage. She duly discharged her outward-bound cargo, and remained in the company's service in the East Indies by virtue of the said charter-party "until and at the time of the committing of the grievance and happening of the loss after-mentioned."

The facts will be best understood if we quote the *ipsissima verba* of the declaration touching this grievance of the plaintiff against the defendants: "Yet the company by their agents, while the ship so remained in their service, wrongfully, unlawfully, and unjustly sent and caused and procured to be sent, amongst other goods and merchandise, to and on board the said ship or vessel, for the purpose of being conveyed therein from Bombay in the East Indies to Tellicherry, a certain package containing

therein certain oil and varnish of a combustible and inflammable nature, without giving due or sufficient notice or intimation thereof to the said J. Ramsden, so being master of the said ship, or to any other person or persons concerned or employed in the navigation thereof, as the said defendants ought to have done, in order that the said Ramsden, or such person or persons concerned or employed as last aforesaid, might stow and deposit the said last-mentioned package in such part of the said last-mentioned ship as not to endanger the safety and security of the same in the conveyance of the said package. That by reason of such notice or intimation not having been given, the said packet was not placed and stowed in manner aforesaid, but was placed in the after-hold of the ship, for the purpose of being conveyed as aforesaid, the same being an unfit and unsafe part of the ship for the stowing the said package, and the safety of the ship being greatly and unnecessarily endangered by the conveyance of the package in that part."

Now as to what happened. Afterwards, on the 1st April, 1798, the *Princess Amelia* sailed under the company's orders from Bombay to Tellicherry. Four days after she weighed anchor, the oil or varnish, "by reason," as the declaration averred, "of its own inflammable and combustible nature,"

set fire to the ship. The unhappy *Princess Amelia* became with her cargo a total wreck, and was utterly burned and destroyed. Williams asked for £20,000 damages against the company. The defendants pleaded "Not guilty."

The evidence was that the commodity which had occasioned the loss of the vessel was a jar of oil or varnish, called by the natives in India "roghan." It was packed in a wicker case. It was supposed to be a composition of gum-gopal and linseed oil of a very inflammable nature. This was put on board by order of the Military Board at Bombay, among a quantity of other military stores. In the written order to receive it on board it was simply called "roghan," without any specification of its nature. It appeared to be the duty of the conductor of the military stores, on the part of the company, to carry them on board, and the duty of the chief mate of the *Princess Amelia* principally to receive and stow the cargo. On this occasion the evidence went to show that the chief mate was the person who had received the "roghan" with other military stores on board.

Now, here the difficulty of Williams arose. The chief mate was *dead*!

Consequently no evidence was forthcoming as to

what passed between him and the conductor of the military stores.

We may add that it was proved that the chief mate had been an officer of skill and discretion; also, that the after-hold where the "roghan" was stowed was a proper place to stow such a package if it were not known to contain an inflammable substance, but an improper place to stow an article of such a nature as this really was.

There was no doubt that it was by means of the "roghan" oozing out of the jar that the *Princess Amelia* was set on fire.

On this evidence Lord Ellenborough nonsuited the plaintiff.

Now the real fight began. A rule *nisi* was obtained, and Adam, Wood, and Bosanquet, as counsel for the defendant, showed cause against it in the Court of King's Bench. "It was a necessary part of the plaintiff's case," said they, "to show that no notice of the dangerous nature of the commodity was given. That was the gist of the action—the wrong complained of, without which the action cannot be sustained, being *Damnum sine injuria*. And the chief mate who received the "roghan" being dead, the plaintiff ought to have called the officer as a witness by whom the delivery

was made, who was capable of saying with certainty whether he had given such a notice.

The Hon. Thomas Erskine, son of the Earl of Buchan and future Lord Chancellor of Great Britain, was counsel for Williams. He was known as Erskine the honey-tongued; and was probably one of the most brilliant advocates that the English Bar has ever seen. With him were Dallas and Williams. Their argument was in this wise: "This being a negative averment on the part of the plaintiff, the affirmation of which was the ground of defence to the action, it lay upon the defendant, whose duty it was to give the notice, to prove affirmatively that it was, in fact, given. The general rule is that the party on whom the affirmation of the issue lies is to begin by proving it. Now, upon the plea of not guilty to an action on the case, which puts in issue every material fact, the same rule must prevail. It often happens that a fact, which is the proper subject-matter of defence to a defendant, and the affirmation of which it is incumbent upon him to prove, must yet be negatived by averment in the plaintiff's declaration. . . . Besides, it might also be considered as some evidence of the negative, that the chief mate, who was an officer of skill, had stowed the package in a situation which no person, know-

ing the dangerous nature of its contents, would, without the grossest ignorance of his duty, have done."

The Court of King's Bench in those days consisted of Justices Grove, Lawrence, and Le Blanc, besides the Lord Chief Justice.

Curia adversari vult. Erskine's argument was not one to be dismissed without consideration.

But Lord Ellenborough, in delivering the opinion of the court, eventually said: "We are of opinion, both on principle and authority, that the burthen of proving that the dangerous article in question was put on board without notice rested upon the plaintiff, alleging it to have been wrongfully put on board without notice of its nature and quality. The next question is whether the plaintiff has given sufficient *primâ facie* evidence of the want of notice to have gone to a jury. And we are of opinion that he has not. The best evidence should have been given of which the nature of the thing was capable. We are, therefore, of opinion that the nonsuit was proper, and that the rule for setting it aside must be discharged."

A great principle of the English law was here declared. Every man is presumed to have acted

rightfully and in accordance with the law—even in civil cases—until the contrary be proved.

The darling cry of English liberty, so dear to the defender of criminals, is: “I am presumed to be innocent until I have been proved to be guilty. Show my guilt beyond reasonable doubt, or I am entitled as of right to an acquittal.”

In British courts of justice, and perhaps in British courts alone, does this principle obtain to the full.

The law presumes against crime, against tort, against even irregularity, until the contrary be proved.

And the East India Company may add to their other trophies this one standard more, which they bore into battle and brought bravely out: *Omnia præsumuntur rite esse acta.*

Erskine fought hard for an old doctrine of logic that: “Nobody must be called on to prove a negative.” But there is an exception to this in English law in favour of the great principle above stated; and Erskine, the victor of a thousand fights, was rightly beaten for once at the Battle of Williams and the East India Company.

VII.

THE BATTLE OF BUTTERFIELD AND FORRESTER.

IN 1809—seven years after the Battle of Williams and the East India Company—King George III. being still upon the throne, an interesting engagement took place between Butterfield and Forrester, whose results were of such moment to the law of England that we think we may well find a place for it in our fifteen decisive battles.

Lord Ellenborough was still Chief Justice, and he was sitting in the Court of King's Bench with Mr. Justice Bayley, who had been the presiding judge at Derby Assizes, when the case was tried at *Nisi Prius*.

The facts which led up to the present battle were as follows:—

Forrester had a house, which was close by the roadside at one end of the town of Derby. That house was under repair, and for the purpose of the repairs he had put a pole across this part of the road. A free passage was left by another branch or street in the same direction.

Butterfield left a public-house not far distant from the place in question at eight o'clock in the evening of an August day, when people were just beginning to light candles, but when there was light enough left to discern the obstruction at a distance of a hundred yards. If Butterfield had not been riding very hard he might have observed and avoided it. But he was riding violently and did not observe it. The consequence was that rider and horse both fell, and the result of the accident was that Butterfield was considerably hurt. He was not intoxicated.

Butterfield accordingly brought an action against Forrester, who had put the offending pole across the King's highway. "This," we are told, "was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse and injured."

At the trial at the assizes the facts were proved as we have above related them; and on this evidence Mr. Justice Bayley directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the

defendant. They did find a verdict for the defendant.

Had Mr. Justice Bayley directed the jury rightly? Mr. Serjeant Vaughan said that he had not, and he moved in the Court of King's Bench for a new trial. He referred to Buller's *Nisi Prius*, p. 26, where the rule is laid down that "If a man lay logs of wood across a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action." Mr. Serjeant Vaughan contended that this was exactly what had happened in the present case; and he claimed that this showed that the direction of the learned judge was wrong.

Mr. Justice Bayley now said: "The plaintiff was proved to be riding as fast as his horse could go. And this was through the streets of Derby! If he had used ordinary care he would have seen the obstruction—so that the accident appeared to happen entirely through his own fault."

Lord Ellenborough said: "A person is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In the case of persons riding upon what is considered to be the wrong side of the road, that would not authorise another

purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care himself. Two things must concur to support this action—(1) an obstruction in the road by the fault of the defendant, and (2) no want of ordinary care to avoid it on the part of the plaintiff."

The rule was accordingly refused.

Beven, in his book on Negligence in Law, alludes to the Battle of Butterfield and Forrester as "the case usually referred to as the first which definitely formulated the rule of law" as to contributory negligence: (2nd edit., vol. I, p. 167).

Great, then, is the importance of this battle. In the work-a-day practice of our courts of law to-day, there is perhaps no doctrine so continually set in force as the doctrine of contributory negligence.

See Bullen and Leake's Pleadings (3rd edit., 1868, p. 753), where the subject is discussed.

The rule is by no means an obvious one, if any tribunal were obliged *de novo* to decide the point. This is clear from the consideration of the law relating to collisions at sea, in which quite different rules prevail. See *The Woodrop Sims* (2 Dods. 1318), where the great Lord Stowell (then Sir William Scott) said: "This is one of those unfortunate cases in which the entire loss of a ship and

cargo has been occasioned by two vessels running foul of each other. . . . A misfortune of this kind may arise where both parties are to blame—where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them.” And in *The Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company* (7 App. Cas. 800, and compare 43 L. T. Rep. 61) Lord Selborne as Lord Chancellor said: “In most cases the argument from abstract justice and equity is *in re dubia* of great importance. But here it seems to me that there is little if any room for that argument. . . . The liability depends upon a rule of the Admiralty Jurisdiction, which to myself has always seemed arbitrary. In examining the practice and procedure of the Court of Admiralty in order to ascertain the true results of that rule, we not only enter upon a branch of forensic jurisprudence the forms of which are different from those of the common law, in which other questions of liability to damage usually arise, but we find important variations in those forms themselves.”

We only call attention to these cases to emphasise the importance of the victory of Forrester in the

Battle of Butterfield and Forrester; to see how easily the decision might have gone the other way in the absence of authority; and to observe how little the considerations of abstract justice and equity would be conclusive on the matter.

The Battle of Butterfield and Forrester was indeed decisive; and the rule which it established by the decision of the Court of King's Bench is a rule put into force almost every day by one or other of the County Court judges in a thousand little battles. And, indeed, in the High Court battles of *fact* are fought many times a term which are in all essential particulars similar to the Battle of Butterfield and Forrester, which was decisive of the *law* of contributory negligence.

VIII.

THE BATTLE OF ADDISON AND GANDASSEQUI.

ONLY three years later than the Battle of Butterfield and Forrester an action was fought on the battlefield of the Court of Common Pleas between Addison and Gandassequi. It is one of those described by that great historian of law-battles, John William Smith; and it has been frequently referred to by lawyers ever since.

King George III. was still upon the throne; and Sir James Mansfield was Lord Chief Justice of the Common Pleas.

Sir James was at this time seventy-nine years of age; he had an ungraceful delivery and a husky voice; but his judgments were sound in law if unpleasant to the ear.

Mr. Serjeant Best—afterwards Mr. Justice Best and raised to the peerage by the name of Lord Wynford—was counsel for the plaintiff. He was one of the most successful advocates at the Bar in 1812.

Mr. Serjeant Shepherd—Solicitor-General to the Prince of Wales and afterwards Lord Chief Baron of the Court of Exchequer in Scotland—appeared for the defendants. He was a great lawyer; and but for the misfortune of his deafness would have probably held very high judicial office in England.

Truly it was a battle of the giants; and the problem raised was worthy of them.

The original action, which was for goods sold and delivered, had been tried before Sir James Mansfield and a special jury at the Guildhall.

Gandassequi was a member and a director of a Spanish trading corporation, called "The Philippine Company." He had come over to England to select a large assortment of goods destined for Lima.

The London firm of Larrazabal, Menojo, and Trotiaga assisted him in providing the goods; and they applied to Addison, with whom they had had previous dealings for twenty years, and Addison went by appointment to their house in the City with patterns of goods.

There he found Gandassequi, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, and told Addison that he should charge a long price, and he, Gandassequi, would himself receive the bounty

on exportation, and stipulated for fifteen months' credit; he took the goods home to his house in Clarges Street, and kept them a week to examine; a clerk from Addison's house frequently attended upon him there to show and explain the patterns.

Addison received a written order from Larrazabal, Menojo, and Trotiaga for a quantity of these goods; after which Gandassequi required of Addison an abatement of 6 per cent. on the prices of them. This abatement Addison refused to make, and the parties were about to terminate the treaty; but at length Gandassequi agreed to give the whole price required, and told Addison that he might proceed to execute the order.

Addison and his clerks had several other meetings with Gandassequi, and several other parcels of goods were ordered by Larrazabal, Menojo, and Trotiaga, which had been selected by Gandassequi at those meetings; but they referred Addison to Gandassequi for instructions as to the mode in which the goods were to be packed for exportation, and Gandassequi gave those instructions. The invoices were made out by Addison to Larrazabal, Menojo, and Trotiaga; and they were debited in Addison's books for the amount of the long price.

Larrazabal, Menojo, and Trotiaga in their books debited Gandassequi with the amount of the

invoices, and also with a commission of 2 per cent., which were their usual terms of dealing with him ; and they credited Addison with the amount of the invoices.

Upon an occasion subsequent to these sales, Larrazabal, Menojo, and Trotiaga having applied to purchase some goods of Addison, the latter said that he thought he had for that time extended his credit far enough to them, and declined to furnish the goods.

Larrazabal, Menojo, and Trotiaga gave the orders for packing and shipping the goods, and in their own names. But, in pursuance of instructions given by Gandassequi, they chartered a vessel to Lima, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and of their demand on Gandassequi. The master did not deliver the return cargo until after (in consequence of instructions from Larrazabal, Menojo, and Trotiaga) a sum of £72,000 had been deposited by Gandassequi for their security.

Larrazabal, Menojo, and Trotiaga became bankrupt.

One of the partners in their house stated that the house purchased these goods of Addison on their own credit and account, as they would any other

goods for which they had occasion in their trade ; they had insured them in their own names, for which they had a further commission of $\frac{1}{2}$ per cent.

Addison then sued Gandassequi.

For the plaintiff it was contended that, though the credit was given to Larrazabal, Menojo, and Trotiaga, yet that, as the defendant had the goods, he was liable to pay for them ; that this was only the common case of a broker buying for his principal ; that principal when disclosed was liable.

Sir James Mansfield left it to the jury to say whether or no Larrazabal, Menojo, and Trotiaga did act as brokers. He observed that, as the defendant saw and handled the patterns and was seen in the business, if he had been the purchaser most probably the credit would immediately have been given to him. The jury, being of opinion that the goods were sold to Larrazabal as principal, found a verdict for the defendant.

Mr. Serjeant Best obtained a rule ; and now the real battle began in the Court of Common Pleas.

Larrazabal, Menojo, and Trotiaga were the mere agents, said Best, of the defendant, which was indicated by their receiving a commission. The plaintiff in fact had the security of both parties. For, under the written order which did not affect the real buyer, the agents were liable ; and the

defendant was liable because he had the goods, which raised a sufficient contract. For by the law of England he who has the goods shall be obliged to pay for them. It had been admitted that when a broker contracts for a principal unknown, when such principal is discovered he may be sued; and so, if one partner only contracts, the others when discovered are liable. The principal could only be discharged by payment, and that payment must be to the vendor, if he is known; if he is unknown, the purchaser must pay the agent. But unless he pays one or the other he is liable.

Shepherd contended that the effect of the evidence was that Larrazabal, Menojo, and Trotiaga were not the agents of the defendant in the affairs, but were in fact the principals to whom the credit was given, for that otherwise the defendant could never have obtained the goods, for no one would have given credit to a person unknown.

Sir James Mansfield, in delivering the judgment of the court, said: "If a man selling to another for the use of a third, who stands by and is known, may make the contract with the buyer without making the third person responsible, certainly this is that case. . . . The insolvency of Larrazabal, Menojo, and Trotiaga may make an unfortunate difference in the case as to the consequences; but it

will not alter the liability. We who are called on to set aside this verdict must, in order thereto, say on this evidence that Larrazabal, Menojo, and Trotiaga only were not to be the debtors, but that the defendant also who was to buy these goods for 'The Philippine Company' was to be liable. But we can find no evidence to warrant us in that conclusion. The rule must therefore be discharged."

IX.

THE BATTLE OF HADLEY AND BAXENDALE.

MUCH had happened in the six-and-forty years which had passed between the Battle of Addison and Gandassequi and that which we are now about to describe. Three Kings had died—George III., George IV., and William IV.; and Queen Victoria, of glorious memory, was now in the seventeenth year of her reign.

This time the battlefield is to be the Court of Exchequer, over which the Lord Chief Baron, Sir Frederick Pollock, now presided, though on the present occasion it was Mr. Baron Alderson who delivered the judgment of the court.

The action had originally been tried at the Gloucester Assizes before Mr. Justice Crompton, and Whately had obtained a rule *nisi* for a new trial on the ground of an alleged misdirection by the learned judge, who had at that time not been very long upon the Bench.

At the trial it had appeared that the plaintiffs carried on an extensive business as millers at

Gloucester; and that on the 11th May their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam engine was manufactured by a firm of engineers, called Joyce and Co., at Greenwich. And it became necessary to send the shaft to them at Greenwich as a pattern for a new one. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who were the well-known carriers trading under the name of Pickford and Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was that, if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants before twelve o'clock for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance. At the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was that the plain-

tiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

“Delayed by some neglect.” These words are vague: but we need not be more particular. The Battle of Hadley and Baxendale had nothing to do with the law of negligence.

The defendants admitted that they were in default. They paid money into court.

The Battle of Hadley and Baxendale was the battle of the measure of damages!

The plaintiffs claimed the profits they would otherwise have received had the delay not taken place. On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them.

Mr. Justice Crompton left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

Henry Keating—afterwards Mr. Justice Keating—who had Dowdeswell for his junior, showed cause on behalf of the plaintiffs. “The principle upon which damages are assessed,” said they, “is founded upon that of rendering compensation to

the injured party. . . . There was ample evidence in the present case of the defendants' knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered. There was ample evidence that they knew the purpose for which this shaft was sent, and that the result of its non-delivery in due time would be the stoppage of the mill. For the defendants' agent at their place of business was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made. The defendants must therefore be held to have contemplated at the time what in fact did follow as the necessary and natural result of their wrongful act."

James Shaw Willes—afterwards the great Mr. Justice Willes—was one of the counsel for Baxendale. He had Whately for his leader, and Phipson for his junior. "It is clear," they said, "that complete compensation is not to be awarded in every case. Take the case of a breach of a contract to supply a rick cloth, whereby and in consequence of bad weather the hay, being unprotected, is spoiled—that damage would not be recoverable. The true test is that the special damage must be the natural result of the thing."

The court took time to consider. When he did

deliver the judgment of the court, Mr. Baron Alderson said: "We think that there ought to be a new trial in this case. But, in doing so, we deem it to be expedient and necessary to state explicitly the rule which the judge at the next trial ought, in our opinion, to direct the jury to be governed by when they estimate the damages." The rule then stated may be expressed under three heads. We take this from the analysis of the *Battle of Hadley and Baxendale* in *Mayne on Damages*, 6th edit. pp. 12 and 13.

1. Damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable.

2. Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract.

3. Where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been con-

templated by the parties to the contract, and is recoverable.

“A fourth rule,” says Mayne, “is applied,” viz:—

4. Damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable whether those circumstances were or were not known to the person who is being charged.

“Now,” said Mr. Baron Alderson, “if we are to apply the principles above laid down in the present case, we find that *the only circumstances here communicated by the plaintiffs to the defendants at the time that the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill.* But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits

of the mill. Or, again, suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not in all probability have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants."

We confess that in this part of the Battle of Hadley and Baxendale we have great sympathy with the discomfited millers. That portion of the judgment of Mr. Baron Alderson which we have italicised does not appear to be quite accurate in fact. Besides the circumstances mentioned by the learned Baron as having been communicated to the defendants, there was the fact that *the mill had stopped*. The rest might almost have followed by necessary inference.

It is, of course, however, as a battle of law that the Battle of Hadley and Baxendale is chiefly of interest at the present day. Whether Hadley received £25 damages more or less is a matter of little concern to posterity; but the great rules which resulted from the Battle of Hadley and Baxendale have been of importance ever since in many thousands of cases; and they form the model for the measure of damages in cases of all sorts—cases of loss of market—cases of loss of season—cases of loss of irreplaceable commodities, &c.

As each of such battles draws to its close in English courts of justice—and in many other courts in various parts of the world where English precedents are respected—neither the victor nor the vanquished are willing to ride off the field until he has proved that the proper measure of damages is one which tells in his own favour—according to the rules established in the notable Battle of Hadley and Baxendale.

X.

THE BATTLE OF LIMPUS AND THE LONDON GENERAL OMNIBUS COMPANY.

It was in the year 1862 that this—one of the most momentous battles of the common law—was fought. We are now coming to modern history. Lord Westbury, for many years known to the world as Bethell, leader of the Chancery Bar, then sat upon the Woolsack, and Sir Alexander Cockburn was Chief Justice. But our present business is with the Court of Exchequer Chamber, whose *personnel* upon the day in question consisted of Justices Wightman, Williams, Crompton, Willes, Byles, and Blackburn—a very learned court, and one that was well competent to deal with such a question as that which was to be argued before it.

Limpus was the proprietor of an omnibus; and the defendants—veteran soldiers in this class of warfare and frequent conquerors—were the like.

Lush, afterwards Lord Justice Lush, was counsel for Limpus; and Mellish, afterwards Lord Justice Mellish, appeared for the defendant company.

The matter in dispute was the correctness of the directions given in summing up by Mr. Baron Martin when trying an action between these parties at Nisi Prius with a jury.

At the trial the driver employed by Limpus had stated in evidence that as he was driving from Sloane Street to Kensington he stopped to take up two passengers; that then the company's omnibus passed his; that after passing the company's driver eased his pace; that the witness went on at his regular pace and overtook the company's omnibus; that there was room on the road then for five or six omnibuses abreast; that when the witness got up to the company's omnibus the latter was upon the off side of the road, but that there was enough room to pass; that as the witness was going to pass the company's driver pulled across the road, and one of his hind wheels touched the shoulder of one of the witness's horses; that the company's driver threw the witness's off horse on to the bank; that the wheels also went up the bank, and the omnibus belonging to Limpus was upset. Other witnesses had stated that the company's driver pulled across the road for the purpose of preventing the omnibus belonging to Limpus from passing on the off side; and that it was a reckless piece of driving on the part of the company's driver. Some

evidence had also been given as to something which had taken place between the two drivers on a day antecedent to the accident. The company's driver himself, whose name was Whitechurch, had been called, and had sworn that he passed the omnibus belonging to Limpus as he took up the two passengers; that afterwards the driver employed by Limpus put his horses to a gallop to pass the company's omnibus again; that, as soon as he got up, he (Whitechurch) pulled across to keep the other omnibus from passing him, "to serve him as he—the driver employed by Limpus—had served" the witness, and that he (Whitechurch) pulled across him on purpose. He had stated, further, that he had been presented with the following regulations by the company, and that every driver had been directed to act in accordance therewith. "During the journey he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list, *and not on any account to race with or obstruct other omnibuses, or hinder or annoy the driver or conductor thereof in his business, whether that omnibus be one belonging to the company or otherwise!*" Another witness called on behalf of the company had said that the company's driver maliciously and spitefully drove his horses suddenly on to the footpath.

These were the facts upon which the fight was fought. Unborn employers of labour had a great stake in the issue. What was to be the limitation of the maxim *Respondeat superior*? Could your servant bring you into peril of the law when he was acting, as here, in direct disobedience of your orders? And, if so, upon what principle was the master to be held responsible—because he ought to have been more careful in choosing a servant (*culpa in eligendo*) or how otherwise? Were all the acts of the servant to bind his master, or all his lawful acts, or what other class of acts?

The answer to all these questions in this twentieth century depended—so far as regards the law of England—on whether the following direction of Mr. Baron Martin was preserved or pulverised by the event of the battle.

Mr. Baron Martin directed the jury that, where the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service, and that if the jury believed that the real truth of the matter was that the company's driver Whitechurch, being dissatisfied and irritated with the driver employed by Limpus, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted carelessly, recklessly,

wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the company, then the company were responsible for the acts of their servant; that if the act of Whitechurch in driving as he did across the road to obstruct the omnibus belonging to Limpus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers and so to interfere with the trade and business of Limpus and his omnibus, then the company were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and that the instructions given to Whitechurch and read in evidence to the jury were immaterial if Whitechurch did not pursue them, and that what had occurred between the drivers of the rival omnibuses upon the day previous to the occurrence complained of was immaterial and irrelevant. But that if the true character of the act of the company's servant was that it was an act of his own and in order to effect a purpose of his own, the company were not responsible."

The jury gave the plaintiff Limpus a verdict for £35 damages; but the really interesting question

was, What would the Court of Exchequer Chamber say?

Mellish began, and found himself immediately upon difficult if not untenable ground. The court began to ask him questions—one member of it after another each proposing his own conundrum in the fashion followed to-day by the successors of that learned court.

“Is it not,” asked Mr. Justice Crompton, “carrying out the master’s purpose to get before the other omnibus, and get the run of the road?”

“Was not,” said Mr. Justice Blackburn, “that which the driver did a step for the purpose of picking up passengers?”

“You must admit”—this is the way in which Mr. Justice Williams illustrated the difficulty—“that if the master gave his servant directions not to get drunk and drive, and he did get drunk and drive, his master would be liable.”

Mr. Justice Wightman came to the assistance of the labouring Mellish. “Would the master,” he asked, “have been liable if the servant had thought it best for his master’s interest to run against and overturn the other omnibus and did so intentionally?” “No,” said Mellish, and he cited *Lyons v. Martin* (8 A. & E. 512).

Lush said that the direction was perfectly right;

and *Lyons v. Martin* merely decided that trespass would not lie against the master.

Now, *Lyons v. Martin* is a case about the wrongful distraining of a horse.

Curia adversari vult.

On the 25th June, 1862, their Lordships delivered their judgment.

Mr. Justice Wightman said: "The defendants' coachman was not employed to obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service in the proper sense to do so. Upon the evidence it was certainly his own wrongful and wilful act, for which I think . . . the defendants are not responsible. The jury, upon the direction, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and he thought it was for their benefit to obstruct the other omnibus, the defendants would be liable. This, I think, was wrong; and I am of opinion that there should be a *venire de novo*."

Limpus must have feared that he was about to lose his case. If the other judges had agreed with Mr. Justice Wightman, employers of labour would have been freed from much of their responsibility for all future time:

"And Flodden had been Bannockburn."

Dis aliter visum. Mr. Justice Williams thought the summing up was substantially in accordance with the correct doctrine, and with him, after much hesitation, Mr. Justice Crompton agreed. The learned Mr. Justice Willes "did not entertain a doubt but that the direction was perfectly correct." Mr. Justice Byles, concurring, said: "If we were to hold that this direction was wrong, a change, of course, at *Nisi Prius* would follow, and the consequence would be that in almost every case a driver would come forward and exaggerate his own negligence or misconduct, he not being worth one farthing, and say: 'I did it wilfully and unnecessarily,' and so the master would be absolved." Mr. Justice Blackburn also agreed, but he added: "A footman might think, and rightly, that it was for the interest of his master that he should get on the box and drive the coach; but no one would say that to do so was within the scope of the footman's employment, and that the master was responsible for the wilful act of the footman in taking charge of the horses."

Therefore the bill of exceptions was dismissed by the court—*dissentiente* Mr. Justice Wightman—and the Battle of Limpus and the London General Omnibus Company thenceforth took its place among the decisive battles of the law.

XI.

THE BATTLE OF JONES AND JUST.

THE historian of this great battle, whose details it is of the first importance for all students of legal tactics and strategy to understand, has an unusually arduous task before him. This battle, sometimes known as the Battle of Manilla Hemp, was fought early in 1868, upon the field of the Court of Queen's Bench, Lord Chelmsford being at this time upon the Woolsack and Sir Alexander Cockburn still being the Chief Justice and presiding in the above-named court, with Mr. Justice Mellor and Mr. Justice Blackburn on the day of the battle as his brothers. It was the great and decisive battle waged in the cause of "implied warranty"; and the narrator's first difficulty arises from the fact that the operations cannot be understood without a short description of the ground which had been lost and won in former battles by the respective adversaries—the vendors and vendees of the mercantile world.

Of these former battles—many of which, although they have no place among our fifteen decisive battles, are very well worthy of study—five are of chief moment; and their results must be briefly stated.

We give their results, therefore, in the following summary, which we have arranged according to their logical, and not their chronological, order—their date being of no importance, since it suffices that they were all fought previous to that which forms the subject of our present chapter.

1. The Battle of Parkinson and Lee about the sale of hops.—Vendor's victory.—Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *Caveat emptor* applies, even though the defect which exists in them is latent and not discoverable upon examination, at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrust his own judgment, he may, if he choose, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable: (2 East, 314).

2. The Battle of Barr and Gibson about the ship *Sarah*, which was sold when she was aground.—Vendor's victory.—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: (3 M. & W. 390).

3. The Battle of Chanter and Hopkins about "Chanter's smoke-consuming furnace."—Vendor's victory.—Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: (4 M. & W. 399).

4. The Battle of Brown and Edgington about the sale of a crane-rope for raising wine from the cellar.—Vendee's victory.—Where a manufacturer or dealer contracts to supply an article which he manufactures or produces or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied: (2 Man. & G. 279).

5. The Battle of Laing and Fidgeon about the sale of saddles.—Vendee's victory.—Where a manufacturer undertakes to supply goods manufactured by himself or wherein he deals, but which the vendee has not the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: (4 Camp. 169).

With the memory of these battles before their eyes, the combatants made ready for the Battle of Manilla Hemp. Temple, Q.C., and C. Russell (hereafter to be famous as Lord Russell of Killowen, the late Lord Chief Justice of England) appeared for Jones, and encouraged themselves by the recollection of the crane-rope and saddle victories won by vendees. Meanwhile, Brett, Q.C. (afterwards Lord Esher, the famous "business-point-of-view" lawyer, and for so many years Master of the Rolls), and Holker (afterwards Lord Justice Holker), who were counsel for Just, spurred on their horses to the fray, holding before them the banner of *Caveat emptor*, which had been borne triumphantly through so many battles by militant vendors, and cheering themselves with the thought of what had happened about the hops and the ship *Sarah* and Chanter's smoke-consuming furnace.

On the trial before Mr. Justice Blackburn it had appeared that Jones, through Beneke and Co., his

brokers, entered into a contract with Just upon the terms of the following sold note :

“Liverpool, 19th Oct., 1865.—We have this day sold for you the following goods to Messrs. J. A. Beneke and Co. : J. H. V. 200 bales Manilla hemp, expected to arrive p. *Richard Cobden* at Singapore for Liverpool ; . . . 309, expected to arrive pr. *Christopher Newton* at Singapore for Liverpool ; . . . 209, expected to arrive per *Fortitude* . . . at Singapore for London . . . H. 193 H. H. I. . . . expected to arrive per *Ophir* at Singapore for Liverpool, at £38 10s. per ton of 2,240 lb., cost freight and insurance. Shipping weights. Payment, cash against shipping documents on 21st Oct., 1865, less 2½ per cent. discount.”

The shipping documents were duly delivered to Jones, and the price was paid. All the vessels named in the contract arrived in due course, with the respective number of bales of hemp having marks corresponding to those specified in the contract on board, and the bales were delivered to Jones. On examination of the bales it was found that the whole of those marked J. H. V. were in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from Manilla to Singapore, been wetted through with salt water, had after-

wards been unpacked and dried, and then repacked in the bales which were afterwards shipped at Singapore.

Manilla hemp is divided into several qualities. The hemp in the bales in question, if in good condition, would have been what is called "fair current Manilla hemp," which is not the lowest quality; but in all the bales the hemp was damaged to some extent, though not so far as to make it lose the character of hemp.

After some correspondence between the parties, the hemp was sold (by the order of Jones) by auction as "Manilla hemp with all faults," and at the auction it realised about 75 per cent. of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice price—that is to say, the price paid to Just. There was no attempt to show that Just knew of the state in which the hemp had been shipped at Singapore.

At the close of the plaintiff's case, Brett, counsel for Just, had contended before Mr. Justice Blackburn—as he still contended before the Court of Queen's Bench—that, in point of law, under this written contract there was no further condition or warranty than that the bales on their arrival should answer

the description of bales of Manilla hemp, which they did. This, said he, was proved by the fact that the hemp, though sold with a stigma upon it, fetched a price only 25 per cent. below that of sound hemp. Brett contended, in short, that as to quality or condition there was no warranty, and that consequently the maxim *Caveat emptor* applied.

The declaration averred that "the defendant promised the plaintiff that the hemp should be merchantable and should be saleable as Manilla hemp, unless it had become unmerchantable and not saleable as Manilla hemp from perils of the seas and navigation after being so shipped from Singapore."

Was any such promise to be implied upon the sold note set out above? Jones said yes. Just said no.

Mr. Justice Blackburn decided against Brett and in favour of the declaration. "I think," said he, "that the question is for the jury whether what was supplied under this contract was, when shipped at Singapore, such as to answer the description of reasonably merchantable Manilla hemp, that being the warranty which, I think, the law implies in a contract to supply, which this is." The judge then reserved leave to move to enter the verdict for the

defendant if there was no evidence to go to the jury of a breach of warranty.

The jury were further told that, if they found for the plaintiff, the damages should be measured by the rate which the hemp was worth when it arrived, compared with the rate which the same hemp would have realised had it been shipped in the state in which it ought to have been shipped—thus giving the plaintiff the benefit of the rise in the market. They found for the plaintiff, damages £756.

Brett had obtained a rule to enter the verdict for the defendant pursuant to the leave reserved; and, by way of a second string to his bow, he added, “or for a new trial on the ground of misdirection as to the measure of damages.” The first was, however, of course the real point; on the second the court decided against him without hesitation.

Brett fought hard to have the verdict entered for the defendant. He cited *Turner v. Mucklow* (8 Jur. N. S. 870), the “spent madder” case; but the court held it entirely distinguishable, because there the defendant had the opportunity, if he had chosen to avail himself of it, of inspecting the heap of “spent madder,” and also because he knew that it was the refuse madder after it had gone through

the plaintiff's processes, and that it was not manufactured for sale.

Brett next ventured an ingenious argument based upon a Scotch statute (19 & 20 Vict. c. 60, s. 5), which, he said, was declaratory of the law, but the court said: "All that it declares is that a seller of goods, without knowledge that they are defective or of bad quality, shall not be held to have warranted their quality or sufficiency."

Brett also appealed to the authority of Chancellor Kent; but the court said: "As the American cases which he cites are generally adverse to his opinion, it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases which he cites."

The general conclusion of the court—after they had taken time to consider—was that under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description. They held that the maxim *Caveat emptor* did not apply to a sale of goods where the buyer had no opportunity of inspection.

Thus the Battle of Jones and Just was a vendee's victory; and the court confirmed to the vendors and vendees respectively the ground which they

had each won in the five previous battles above referred to.

In the result, of the six battles, including the Battle of Manilla Hemp itself, three were won by vendors (the battles of the hops, of the ship *Sarah*, and of Chanter's smoke-consuming furnace), and three were won by vendees (the battles of the crane-rope for raising wine, of the saddles, and this of the Manilla hemp).

And now the general result has been confirmed by Parliament in the statute 56 & 57 Vict. c. 71 (the Sale of Goods Act, 1893).

XII.

THE BATTLE OF THE MERSEY STEEL COMPANY AND NAYLOR.

THIS battle was fought in the House of Lords in 1884. The full names of the combatant companies were "The Mersey Steel and Iron Company, Limited" (appellants) and "Naylor, Benzons, and Co." (respondents).

Cohen, Q.C., and French (afterwards His Honour Judge French) were counsel for the appellants, and C. Russell, Q.C. (afterwards Lord Russell of Killowen), who died in 1900, is stated to have been "with them."

Sir F. Herschell, Q.C., then Solicitor-General, but afterwards Lord Chancellor, who died in 1899, and Bigham, Q.C. (now Lord Mersey), appeared for the respondents.

The appeal was from an order of the Court of Appeal, who had consisted of Sir George Jessel (then Master of the Rolls), who had died in 1883 before the hearing of the appeal to the Lords; Lord

Lindley (then Lord Justice Lindley); and Lord Bowen (then Lord Justice Bowen), who died in 1894. The Court of Appeal had made an order reversing an order of the late Lord Coleridge, then Lord Chief Justice of England, who also died in 1894.

The House of Lords on the day of battle consisted of Lord Selborne (formerly Sir Roundell Palmer), who died in 1895; Lord Blackburn (who appeared in our last battle as Mr. Justice Blackburn, and who died in 1896); Lord Watson, who died in 1899; Lord Bramwell, who died in 1892; and Lord Fitzgerald, who died in 1889.

Since the Battle of Jones and Just, a stupendous change had passed over all the rules of the warfare of litigants, the Judicature Acts, 1873 and 1875 (statutes 36 & 37 Vict. c. 66 and 38 & 39 Vict. c. 77) having been added to the statute rolls. Many ancient fields of battle of bygone lawyers were now scarcely recognisable, and all things were altered more or less.

The facts in the present case may be shortly stated as follows:—

Naylor, Benzon, and Co. bought from the Mersey Steel and Iron Company, Limited, 5,000 tons of steel of the company's make, to be delivered 1,000 tons monthly, commencing Jan., 1881, payment

within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2nd Feb., shortly before payment for these deliveries became due, a petition was presented to wind-up the company. Naylor, Benzon, and Co. *bonâ fide*, under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th Feb. the company informed Naylor, Benzon, and Co. that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th Feb. an order was made to wind-up the company by the court. A correspondence ensued between Naylor, Benzon, and Co. and the liquidator, in which Naylor, Benzon, and Co. claimed damages for failure to deliver the January instalment and a right to deduct these damages from any payments then due, and said that they always had been, and still were, ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator

made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. Naylor, Benzon, and Co. counter-claimed for damages for breach of contract for non-delivery.

The Court of Appeal had said that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the respondent (Naylor, Benzon, and Co.) had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract or so as to release the company from further performance.

Cohen now argued that the Court of Appeal had not applied the true principle for the determination of a case like the present. A contract of the kind sued on was made upon the assumption that the parcel already delivered would be paid for punctually and in time to put the manufacturer in funds to provide for the manufacture and delivery of the next parcel. If either party to such a contract broke it in a material part, the other was absolved from performing his part. He referred to what had happened in the *Battle of Hoare and Rennie* in 1859. *Rennie* bought of *Hoare* 667 tons of Swedish iron to be shipped from Sweden in the

months of June, July, August, and September, in about equal portions each month, at £15 10s. per ton delivered in London. Hoare shipped only twenty-one tons of iron in June, which arrived in London after the expiration of the month; and it was held by the Court of Exchequer that the buyer was not bound to accept the smaller quantity or any subsequent quantity tendered, and that, therefore, a plea showing non-shipment of any larger quantity within the specified time was an answer to an action for not accepting the iron or any part of it: (5 H. & N. 19).

Cohen said, in fact, that payment for one parcel was a condition precedent to the delivery of the next. If the purchaser were solvent, he ought to pay; if insolvent, it was unjust that he should have delivery, and the seller was justified in refusing to deliver. In the *Battle of Withers and Reynolds*, fought in 1831 (2 B. & Ad. 882) in the Court of King's Bench, there had been an express refusal to pay; and Mr. Justice Patteson had left open the question of what was to happen if there were a mere failure to pay for a particular load.

Herschell and Bigham were not called on with regard to this part of the case.

Lord Selborne said: "You must look at the actual circumstances of the case in order to see

whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part ; and I think that nothing more is necessary in the present case than to look at the conduct of the parties and see whether anything of that kind has taken place here. . . . To me it is plain beyond the possibility of controversy that upon the proper construction of this contract it is not and cannot be a condition precedent. . . . It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment. . . . I cannot ascribe to the respondents' conduct the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract."

Lord Blackburn agreed. "The rule of law, as I have always understood it," said he, "is that where there is a contract in which there are two parties, each side having to do something, if you see the failure to perform one part of it goes to the

foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and substantial consideration of my performance is defeated by your misconduct.' . . . There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract."

Lord Watson said: "I think it would be impossible for your Lordships to sustain the appeal unless you are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside."

Lords Bramwell and Fitzgerald concurred.

Naylor, Benzon & Co. therefore won the battle. It was a decisive battle; and all commerce in this country from that day to this has been conducted in accordance with its principles. Sometimes, of course, they are not at first understood; but commercial men have frequently from that day to this taken advice and found that they could not treat a contract as at an end in many cases in which laymen might have supposed that they could so treat it. It was one of those cases in which it was

of primary importance to all business men that the law should be definitely settled one way or the other, that all men may know where they are in a matter which may involve thousands upon thousands of pounds.

Many and various applications of the principle have, of course, been made from time to time according to the particular circumstances of the case; but the principle itself has been perfectly clear from the time of the Battle of the Mersey Steel Company and Naylor.

In conclusion, a short passage may be cited from a judgment of Sir Alexander Cockburn, Lord Chief Justice, which must always be remembered in connection with cases of this class, and the general idea of which may be summed up in a popular manner by saying that "you must not sit on the fence."

"The law," said Sir Alexander Cockburn, "with reference to a contract to be performed at a future time, when the party bound to performance announces prior to the time his intention not to perform it, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party

responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating the loss": *Frost v. Knight* (L. R. 7 Ex. 111).

* * * * *

"Another part of the field," as Shakspeare would say.—Here also the day went against Cohen and French. It was held that sect. 10 of the statute 38 & 39 Vict. c. 77 imported into the winding-up of companies the rules as to set-off in bankruptcy,

and that Naylor, Benzon, and Co. were entitled after the winding-up order was made to set off damages for non-delivery against the payments due from them, and to counter-claim for damages in this action.

XIII.

THE BATTLE OF THE QUEEN AND TOLSON.

OF all the cases to which Queen Victoria of glorious memory was one of the nominal parties, that which was the subject of this decisive battle was perhaps the most important from the point of view of the legal principle involved.

It might easily have been decided the other way. Justices Denman, Field, and Manisty and Barons Pollock and Huddleston all thought that it ought to have been decided the other way. These five dissentients were overruled by the nine other members of the court.

The battle was fought during the Chancellorship of Lord Halsbury in 1889; and the whole then strength of the Queen's Bench Division, with the exception of Mr. Justice (afterwards Lord Justice) Mathew, were upon the Bench, under the presidency of the late Lord Coleridge, the Lord Chief Justice of England.

Henry was counsel for the prisoner, Martha Ann Tolson, who had been convicted of bigamy. This unhappy woman had been married to Tolson on the 11th Sept., 1880. Tolson deserted her on the 13th Dec., 1881. She and her father made inquiries about him, and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On the 10th Jan., 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In Dec., 1887, Tolson returned from America. Like Enoch Arden,

“ . . . The dead man come to life again beheld
His wife his wife no more. . . . ”

Mary Ann Tolson was indicted under sect. 57 of the statute 24 & 25 Vict. c. 100 (the Offences against the Person Act, 1861), which is in these terms :

“ Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, Ireland, or elsewhere, shall be convicted of felony, and being convicted thereof shall be liable, at the discretion of the court, to be

kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour ; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland when the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county or place : Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Mr. Justice Stephen directed the jury that a belief in good faith on reasonable grounds that the husband of the prisoner was dead would not be a defence to a charge of bigamy, and stated in the

case that his object in so holding was to obtain the decision of the Court for the Consideration of Crown Cases Reserved in view of the conflicting decisions of single judges on the point.

The jury convicted the prisoner, stating, however, in answer to a question put by the judge, that they thought that she had in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage; and the judge sentenced her to one day's imprisonment.

Henry's flag which he carried into the battle bore these words emblazoned upon it: *Non est reus nisi sit mens rea.*

"The question," said Henry, "turns upon the construction of 24 & 25 Vict. c. 100, s. 57, which reproduces, with slight and immaterial variation of language, 9 Geo. IV. c. 31, s. 22, and 1 Jac. I, c. 11, by which latter statute bigamy was first made felony and removed from the cognisance of the ecclesiastical courts. At that time the offence was punishable with death, and it is difficult to believe that in 1603 the Legislature intended that a man or woman re-marrying under a *bonâ fide* and reasonable belief that the other party was dead should be liable to capital punishment. Sect. 57 should be construed in accordance with the well-known principle of English law, which is that

emblazoned on my flag. It is true that the Legislature may for its own reasons dispense in any given case with the necessity of a *mens rea*, and may constitute certain acts crimes in themselves; but this is generally done in very clear language."

He then cited Coke upon Littleton (391a), Hawkins' Pleas of the Crown (book 1, c. 25), and Termes de la Ley, tit. Felony, to show that "a person cannot innocently commit felony."

The effect of the proviso in sect. 57, which was Henry's real difficulty, was explained by him thus. It merely raised, he said, a presumption of death after an absence of seven years, during which the other party to the marriage had not known that the absent husband or wife was living. This presumption was wholly different from the ground taken in the present defence, which was based on a reasonable *bonâ fide* belief of the death of the husband, excluding all possibility of the existence of a *mens rea*. After the seven years there was a legal presumption of death, and the burden of proof was on the prosecution; while the seven years were running, the burden of proof was upon the prisoner, and honest and reasonable belief in the death of the husband or wife was a good defence.

No counsel appeared to argue on behalf of the

Crown, and yet the result hung in the balance for some time. "There is no doubt," as Mr. Justice Wills said, "that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past."

As we have already intimated, the majority of the court decided in favour of the prisoner.

Mr. Justice Manisty, who was of the minority, said: "What operates strongly on my mind is this—that if the Legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the Act in question."

Sir Henry Hawkins (afterwards Lord Brampton) gave judgment, on the other hand, as follows: "I am clearly of opinion that she ought to have been acquitted. The ground upon which I have arrived at this conclusion is simply this—that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded

her a complete justification, both legally and morally, there was an absence of that *mens rea* which is an essential element in every charge of felony. As to the meaning of the term 'feloniously,' I do not think I can better define my understanding of it when introduced into an indictment as descriptive of the act charged than by saying that I look upon it as meaning that such act was done with a mind bent upon doing that which is wrong, or, as it has been sometimes said, with a guilty mind. If the views of those who support this conviction could be upheld, no person could with absolute certainty of immunity marry a second time until seven years had elapsed after the supposed death of a former husband or wife, no matter how strong and cogent the proof of such death might be."

How true this is may be seen upon reference to the story told in the case of *Westwood v. Chettle*, related in the *Law Times* for the 5th Jan., 1895, on p. 228, under the title "Alive or Dead," which shows that even a conclusion formed *super visum corporis* may be erroneous; for in that case an unhappy woman saw the nine days' dead body of the man she supposed herself to identify as her husband, and yet reason was found afterwards to question the correctness of her supposition.

{ It must also, however, be remembered that

nothing can make a second marriage in such a case good, or the children of such a second marriage legitimate—not even if the seven years have elapsed. }

The view of Sir Henry Hawkins was also that of Lord Coleridge and of Justices Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles; and the Battle of *Mens Rea* was won by Henry, whose name will probably be associated with this victory as long as the law of England lasts.

Many a battle for a prisoner's liberty has been won under the shadow of his banner—*Non est reus nisi sit mens rea*—though sometimes that banner has waved over defeated forces by reason of the fact that, as Henry said in his speech, "It is true that the Legislature may for its own reasons dispense in any given case with the necessity of a *mens rea*, and may constitute certain acts crimes in themselves": (see, e.g., *Betts v. Armstead*, 20 Q. B. D. 771).

XIV.

THE BATTLE OF DERRY AND PEEK.

THIS battle was fought in the same year as the Battle of the Queen and Tolson, and the principle at stake was very similar in each case.

The Battle of the Queen and Tolson established the law to be that a man is not to be convicted of felony unless a *mens rea* be shown.

The Battle of Derry and Peek established the law to be that a man is not to be cast in damages in an action of deceit unless a *mens rea* be shown.

A man cannot "innocently" commit felony or be guilty of fraud.

But the Battle of Derry and Peek was long and stubborn, and a much harder fight was made to brand the innocent with the stigma of fraud than that which had been made to throw him into prison. On the other hand, the decisive victory in the Battle of Derry and Peek was won before an even more learned tribunal than the Court for Consideration of Crown Cases Reserved. It was

won before the House of Lords, and not by a mere majority of nine to five, but by the unanimous consent of the whole House.

In February, 1883, Sir Henry Peek received a prospectus from the directors of "The Plymouth, Devonport, and District Tramways Company" which contained the following paragraph :

"One great feature of this undertaking, to which considerable importance should be attached, is that, by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

In fact, the so-called right of the company was subject—under their special Act—to the sanction of the Board of Trade; and the Board of Trade refused that sanction.

In 1885 Sir Henry brought an action of deceit against the directors who were responsible for the prospectus—viz., Derry, Wakefield, Moore, Pethick, and Wilde. Mr. Justice (afterwards Lord Justice) Stirling tried the case.

We may cite from the judgment of Lord

Herschell the passage in which he sums up the effect of their evidence. It is absolutely essential to the understanding of the case.

“I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the Bar, and a director of one of the London tramway companies. He states that he was aware that the consent of the Board of Trade was necessary, but he thought that such consent had been practically given, inasmuch as the plans had been laid before the Board of Trade with the statement that it was intended to use mechanical as well as horse-power, and, no objection having been raised by the Board of Trade, and the Bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that practically and substantially they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the Board of Trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations, but that, on any reasonable requirements being complied with, they could not refuse their consent. It never entered his thoughts that

after the Board had passed their plans with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of the Act, inasmuch as he understood that the consent was obtained. He so understood from the statements made at the Board by the solicitors to the company, to the general effect that everything was in order for the use of steam; that the Act had been obtained subject to the usual restrictions; and that they were starting as a tramway company with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the Board of Trade, because, as they had got the Act of Parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is that, though he was aware that under the Act the consent of the Board of Trade was necessary, he thought that, the company having obtained their Act, the Board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He

believed at the time that it was correct to say they had the right to use steam."

Mr. Justice Stirling gave credit to these witnesses. He decided in favour of the defendants, and said: "Mercantile men would be the first to cry out if I extended the notice of deceit into what is honestly done in the belief that these things would come about, and when they did not come about make them liable in an action of fraud."

The Court of Appeal, consisting of Lord Justice Cotton, Sir James Hannen (afterwards Lord Hannen), and Lord Justice Lopes (afterwards Lord Ludlow) reversed his decision, holding that the directors were liable for the misstatement, as it was made without reasonable grounds for their believing it.

And now the battle began in the House of Lords. Sir Horace Davey, Q.C. (afterwards Lord Davey), Moulton, Q.C. (afterwards Lord Moulton), and Muir Mackenzie fought for the appellant directors; Bompas, Q.C., Byrne, Q.C. (afterwards Mr. Justice Byrne), and Patullo for Sir Henry Peek.

The latter cited about twenty cases, and did all that in them lay to show that the view of the Court of Appeal was right. But the view of the Court of Appeal was an unconscionable view, and when the noble and learned Lords gave judgment

they all made it clear that fraud means fraud, and that negligence, however gross, can never be fraud, although it may be evidence of fraud.

The judgments in the House of Lords are very long. We can only give a few extracts from them.

But these extracts are of enormous value. They will form the earthworks behind which every defendant charged with fraud in every future battle will shelter his troops.

Neither judges nor juries will fear to find fraud if the evidence is clear; but, if not, let the attacker beware how he makes a frontal attack on those who have such strongly held trenches to protect them as the judgments which we are about to cite. That is the moral of the decisive Battle of Derry and Peek.

Lord Halsbury said: "I consider the *mens rea* an essential condition of an action for deceit."

Lord Watson said: "I have no hesitation in rejecting the doctrine that a man who makes a representation with a view of its being acted upon in the honest belief that it is true commits a fraud in the eye of the law if the court or a jury shall be of opinion that he had not reasonable grounds for his belief."

Lord Bramwell said: "This is a charge sup-

ported on such materials as to make all character precarious. . . . There is never any occasion to use the phrase 'legal fraud.' . . . I think it a mischievous phrase. . . . To found an action for damages there must be a contract and breach, or fraud. . . . When a man makes a statement to be acted on by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, he is liable to an action for deceit. . . . There is a duty to tell the truth, or, rather, what is believed to be the truth. . . . To believe without reasonable grounds is not moral culpability, but (if there is such a thing) mental culpability. . . . I know of no fraud which will support an action of deceit to which some moral delinquency does not belong. . . . In all the judgments of the Court of Appeal there is a confusion of unreasonableness of belief as evidence of dishonesty and unreasonableness of belief as of itself a ground of action."

Lord Fitzgerald said: "The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established."

Lord Herschell said: "I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain

rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. . . . There is another class of action which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. . . . To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making through want of care a false statement which is nevertheless honestly believed to be true. . . . I think there is here some confusion between that which is evidence of fraud and that which constitutes it. . . . I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to

be untrue, of itself renders the person who makes it liable to an action for deceit. . . . I think the authorities establish the following propositions : First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. . . . In my opinion making a false statement through want of care falls short of and is a very different thing from fraud. . . . The ground upon which an alleged belief was founded is a most important test of its veracity. . . . I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding

a man fraudulent whether his acts can or cannot justly be so designated."

The House rather leaned against than in favour of the defendant directors, because "there were circumstances," as Lord Fitzgerald said, "connected with the promotion of the company and the procuring of four of the defendants to act as directors which tended to create suspicion as to their statements and their *bonâ fides*."

But Lord Herschell "thought this must not be unduly pressed"; and this makes it only the more clear that the result of the Battle of Derry and Peek is to cast a great burden on all who in future battles may impute to other men dishonesty or fraud.

Lord Justice (afterwards Lord) Bowen in a subsequent case explained how it had come about that a contrary view to that enunciated by the House of Lords had ever to any extent prevailed. It arose from the fact that Equity judges had to try both law and facts and had no juries to direct. He said: "Cases of gross negligence in which the Chancery judges decided there had been fraud were piled up one upon another until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud

and dishonesty were the proper *ratio decidendi*, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendants' conduct had been dishonest": (*Le Lievre v. Gould*, 1893, 1 Q. B. 491).

But the Battle of Derry and Peek was a very decisive battle; and no such "piling up" of cases of negligence will ever in future enable any general to win any battle of "fraud or no fraud."

XV.

THE BATTLE OF ALLEN AND FLOOD.

BUT was this a decisive battle? On some points we think decidedly yes. Let us, however, tell the story and enable our readers to judge for themselves.

This battle raged for a long space of time, and came to its final conclusion on the 14th Dec., 1897, in the House of Lords.

In April, 1894, about forty boilermakers or "iron-men" were employed by the Glengall Iron Company in repairing a ship at the company's Regent's Dock in Millwall. They were members of the Boilermakers' Society, a trade union, which objected to the employment of shipwrights on ironwork.

On the 12th April, 1894, William Cridge Flood and Walter Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boilermakers, on discovering that Flood and

Taylor had shortly before been employed by another firm called Mills and Knight on the Thames in doing ironwork on a ship, became much excited, and began to talk of leaving their employment. One of them, whose name was Elliott, telegraphed for Thomas Francis Allen, the London delegate of the Boilermakers' Society.

Allen came up on the 13th April, and being told by Elliott that the iron-men or some of them would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the Council of the Society that they should be deprived of all benefit from the Society and be fined, and that they must wait and see how things settled. Allen then had an interview with Halkett, the manager of the Glengall Company, and Edmonds, the foreman; and the result was that Flood and Taylor were discharged at the end of the day by Halkett. Halkett thought that he had no option in the matter, because if the boilermakers to the number of a hundred had been called out it would have stopped the company's business.

Then active warfare began. An action was brought by Flood and Taylor against Allen for maliciously and wrongfully and with intent to injure Flood and Taylor procuring and inducing

the Glengall Company to break their contract with Flood and Taylor and not to enter into new contracts with them, and also maliciously intimidating and coercing Flood and Taylor, and also unlawfully and maliciously conspiring with others to do the above acts.

In reply to questions addressed to them by Mr. Justice Kennedy, the jury found that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment and not to engage them; that Flood and Taylor had each suffered £20 damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration Mr. Justice Kennedy entered judgment for the plaintiffs for £40. He had previously ruled that there was no evidence of conspiracy or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time.

The field of operations was now transferred to the Court of Appeal, consisting of Lord Esher (Master of the Rolls), Lord Justice Lopes (afterwards Lord Ludlow), and Lord Justice Rigby. The result was the same as that in the court of first instance.

And now in the House of Lords there began a veritable battle of the giants—the greatest battle perhaps of modern times. The fighting started on

the 10th Dec., 1895, before Lord Halsbury (the Lord Chancellor) and Lords Watson, Herschell, Macnaghten, Morris, Shand and Davey, and lasted for four days. These four days were without result, and the battle was renewed again in March and April, 1897. Two more Law Lords attended—Lord Ashbourne and Lord James of Hereford. Cohen, Q.C., Robson, Q.C. (afterwards Lord Robson), and E. Morten appeared for the appellant, and Lawson Walton, Q.C., and Rufus Isaacs (now Lord Reading) for the respondents. But the list of the forces engaged is by no means exhausted by the enumeration of these names. The judges were summoned to advise their Lordships, and gave various opinions which added doubtless to the perplexity to which the tribunal was subjected.

Lawson Walton, Q.C., and Rufus Isaacs, hitherto victorious, fought hard to maintain the ground which they had won. The decision of the Court of Appeal, they argued, might be supported on two grounds. First, Allen obstructed and interfered with Flood and Taylor's trade and means of livelihood. That was in itself, said they, an unlawful act. But, secondly, if that were lawful, they contended that it would be made unlawful if done from a desire to punish Flood and Taylor, or from any motive which imported malice. There was

abundant evidence of this bad motive, not only in the evidence given by Halkett and Edmonds, but in Allen's own shuffling and prevaricating account of himself and his interview with them. Flood and Taylor had a clear right to the employment. The Glengall Company desired to employ them. Whenever a right was infringed and damage resulted, an action lay unless the defendant could show that he was exercising a right or discharging a duty. In the case of *Bradford Corporation v. Pickles* (1894, 3 Ch. 53) no right was infringed. This principle, which was of universal application, was illustrated in the case of libel and of malicious prosecution. In both cases malice was of the essence, as, for instance, when the criminal law was put in motion wrongfully for an indirect purpose such as obtaining payment of a debt. There was no such distinction as Allen's counsel sought to establish between rights *ex contractu* and others. The old action on the case had no reference to contract, nor had the parents right to sue for the seduction of an adult daughter. *Bowen v. Hall* (6 Q. B. D. 333) and *Lumley v. Gye* (2 E. & B. 216) were really in the same category as action for malicious prosecution and libel. In both cases the motive was held to be the principal element in the cause of action. In *Lumley v. Gye* it ran

throughout the judgments of Chief Justice Erle and Mr. Justice Crompton, and the words constantly recurred that the defendant "maliciously" induced, enticed, and procured Miss Wagner to break her contract. The mere procurement to break her contract would not be actionable if the act was honestly done in the supposed discharge of duty. Nor would the procurement to interfere with a man voting, as in the *Battle of Ashby and White* (see *Law Times* for the 24th Aug., 1901, and 1 Sm. L. C. 231), if the act were here, too, honestly done in the supposed discharge of duty. So if a man in good faith advised a course which was afterwards held to be a breach of duty no action would lie. But such cases were widely different from the present. A bad motive for doing an act not wrongful in itself would make it actionable. (*Gibbs v. Pike*, 9 M. & W. 351.) In the present case both elements were present. The interference with the right of Flood and Taylor to obtain employment where they could was an unlawful act, and there was malice or intention to injure Flood and Taylor. Illustrations of similar acts were the persuasion of a servant to leave his master with the knowledge that it would injure the master, and the inducement of a landlord to give a tenant notice, interfering with the tenant's

right to occupy the premises for trade purposes. The two decoy cases were instances of unlawful interference with trade. So in *Tarleton v. McGawley* (1 Peake N. P. C. 270), where firing at natives for the purpose of preventing their trading with the plaintiff was held actionable. In *Mogul Steamship Company v. McGregor* (1892, A. C. 37) there was no interference with trade beyond legitimate competition; but the two decoy cases were throughout expressly approved by Lord Justice Bowen (afterwards Lord Bowen), Lord Justice Fry, and Lord Field. Lord Justice Bowen said: "Intimidation, obstruction, and molestation is forbidden: so is the intentional procurement of a violation of individual rights, contractual or other."

At this point Lord Herschell interposed a question or two. "Is competition," he asked, "the only permissible form of interference? Is a temperance crusade unlawful?"

The answer given by counsel for Flood and Taylor came promptly. "If the crusade were against a particular publican it would be unlawful. So if a priest refused the consolations of religion to individuals. In a large variety of cases the motive had been held to be the determining factor."

This specious argument was unsuccessful. Lawson Walton, Q.C., and Rufus Isaacs had

fought hard and well, and had convinced many of those whom they had to convince ; but the majority of the Law Lords were against them.

The following question was propounded to the judges : " Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury ? "

Sir Henry Hawkins (afterwards Lord Brampton) said that there was, Mr. Justice (afterwards Lord Justice) Mathew that there was not, Mr. Justice Cave that there was, Mr. Justice North that there was, Mr. Justice Wills that there was, Mr. Justice Grantham that there was, Mr. Justice Lawrance that there was, and Mr. Justice Wright that there was not.

So far Flood and Taylor's chances appeared to be in the ascendant. The Lord Chancellor (Lord Halsbury) also was in their favour with the two Irish Lords Ashbourne and Morris, but the other five Law Lords awarded the victory to Allen.

The legal proposition established in this Battle of Allen and Flood is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

And Lord Herschell said: "I do not doubt that everyone has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if these terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition—viz., that everyone has a right to do any lawful act he pleases without 'molestation' or 'obstruction.' If it be intended to assert that an act not otherwise wrongful becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases to induce, to advise, to exhort, to command, provided he does not slander or deceive, or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because

his words may interfere with someone else in his calling?"

We have called this a decisive battle. Was it so indeed? There have been those who have questioned it, and who think that the later Battle of Quinn and Leathem restored a substantial part of the debated territory to the party vanquished in the Battle of Allen and Flood.

But the cases were entirely different. In *Quinn v. Leathem* (1901, A. C. 495), the plaintiff satisfied the jury that the defendants had wrongfully and maliciously induced customers and servants to refuse to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy framed among them; that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment; and that all this was done with malice to injure the plaintiff, and did injure the plaintiff. "If," said the Lord Chancellor, "upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community. . . . This case is distinguished in its facts from those which were the essentially important facts in *Allen v. Flood*." Lord Macnaghten said: "I cannot help thinking that the case of *Allen v.*

Flood has very little to do with the question now under consideration." Lord Shand said: "As to the vital distinction between *Allen v. Flood* and the present case, it may be stated in a single sentence. In *Allen v. Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas in the present case, while it is clear there was combination, the purpose of the defendants was to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." Lord Brampton said: "In this case the alleged cause of action is very different from that in *Allen v. Flood*." Lord Lindley said: "The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*."

The Battle of Allen and Flood was then, we contend, thus far at least decisive—it established that the presence of malice by itself would not turn an act which was not unlawful into an unlawful act giving a cause of action. The law of conspiracy was not touched by it; nor was the criminal law, nor the law concerning threats of an improper nature.

While, therefore, the Battle of Ashby and White,

the first of our fifteen decisive battles, which was fought two hundred years ago, decided that "there cannot be a legal right infringed without a remedy," the last of our decisive battles emphasised the converse proposition that "there cannot be a remedy, without a legal right infringed."

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